IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,
Petitioners,

v.

ABRAM BRYANT,

and

TEAMSTER BREWERY AND SOFT DRINK WORKERS JOINT BOARD OF CALIFORNIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNION RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES:

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS: Page

TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE RULINGS: Page

MISCELLANEOUS:

TABLE OF AUTHORITIES—Continued

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 585 F.2d 421. It is reproduced at Pet. App. 1-13.[1] The order and judg-

[1] Citations to the Appendix filed with the Petition for Certiorari will be indicated by "Pet. App." "A" refers to the Appendix filed in this Court, while references to the Record below will be prefaced

ment of the United States District Court for the Northern District of California are reproduced at A. 43-45. No opinion was written by the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 3, 1978. A motion for rehearing was denied on January 11, 1979. This Court granted the Petition for a Writ of Certiorari on June 4, 1979. 47 U.S.L.W. 3786. The Union parties did not file a Petition; they are before this Court as Respondents supporting the position of the Petitioners under Sup. Ct. Rule 21(4). This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a collectively bargained provision, included for more than twenty years in agreements covering a multi-employer bargaining unit, which establishes separate job classifications and tiers within such classifications for permanent, temporary and new employees, constitute a seniority system within the meaning of Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h), where:

> (a) Employees progress between tiers on the basis of time worked in the industry in a single calendar year;
>
> (b) Progression between tiers affords employees greater benefits and job security both in individual brewery establishments and in the industry; and

by "R." The Petitioners, California Brewers Association and the individual breweries, will be referred to collectively as the "Employers." The Teamster Brewery and Soft Drink Workers Joint Board of California and the individual Local Unions will be referred to collectively as the "Unions." The Respondent, Abram Bryant, will be referred to by name or as the "Respondent."

> (c) Employees are ranked within job classifications and within each tier according to length of tier service in the establishment?

2. If so, did the Court of Appeals err by deciding without a factual record that the requirement for advancing between temporary and permanent tiers (i.e., that the employee work in the industry for forty-five weeks in a calendar year) was separable from that seniority system and not protected by Section 703(h)?

STATUTE INVOLVED

Section 703(h) of the Civil Rights Act of 1964, 78 Stat. 257, 42 U.S.C. § 2000e-2(h), provides in relevant part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . . ."

STATEMENT OF THE CASE

A. Nature Of The Amended Complaint And Proceedings In The District Court

The original complaint in this case was filed on October 19, 1973 (R. 1-15). It was amended on February 15, 1974 (R. 106-22) and again amended on May 22, 1974 (A. 9-24). As amended, the complaint alleged that the Employers and Unions had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, § 1, 14 Stat. 27, by negotiating, maintaining and

enforcing seniority and referral provisions that had the result of perpetuating racial discrimination in hiring (A. 18-19). A second claim for relief alleged that the Unions had breached their duty of fair representation under 29 U.S.C. §§ 159, 185, by negotiating "unreasonable privileges for some employees over others . . ." (A. 19). The case was filed as a class action in which the single named plaintiff, Abram Bryant, sought to represent a class consisting of all Blacks who have been or will be employed by the Employers in California, as well as all Blacks who have or will seek such employment (A. 11-12). On September 11, 1974, the District Court dismissed the second amended complaint for failure to state a claim upon which relief could be granted (A. 43-45). Rule 12(b)(6), Fed. R. Civ. P.

1. *Allegations of the Second Amended Complaint* [2]

Respondent Bryant alleges that he is a Black male, first employed by Petitioner Falstaff on May 1, 1968 (A. 11, 13, 17), and a member of Respondent Local 856 (A. 11, 17). He is an incumbent, temporary brewer holding seniority rights under Sections 4 and 5 of the collective bargaining agreement. Falstaff and six other brewery Employers in California are represented, for collective bargaining and labor relations purposes, by Petitioner California Brewers Association. On behalf of the breweries, the Association bargains with Respondent Teamster Brewery and Soft Drink Workers Joint Board of California (A. 12-13). The Joint Board is empowered to represent in collective bargaining negotiations the Respondent Local Unions which, in turn, hold statutory

[2] The evidentiary record in this case contains, in addition to the complaints and Petitioner Falstaff's original answer (R. 16-23), only the collective bargaining agreement between the Employers and the Unions, and Bryant's answers to Falstaff's first interrogatories (R. 284-329). Like the Courts below, therefore, we rely on Bryant's factual contentions in this posture of the case.

representational rights for the breweries' employees (A. 14-15). The Unions and Employers are part of one multi-employer bargaining unit, and are covered by a single agreement statewide in its application (A. 15).

The complaint alleged, *inter alia*, that the Employers historically "have discriminated against [B]lacks both in hiring and employment . . ." (A. 16). The Unions were alleged to have acted in concert with the Employers in such discrimination, and also to have discriminated against Blacks in referring applicants from hiring halls (A. 16). "The vehicles for the perpetuation of this invidious discrimination," according to the complaint, "are the seniority and referral provisions of the collective bargaining agreement . . ." (A. 16). Singled out for particular attention was the Agreement's requirement that an employee work forty-five weeks in the industry in a single calendar year to reach permanent status in his or her job classification (A. 10, 16-17). Because of the contract provisions complained against, and his "off and on" employment in the industry since May 1, 1968 (A. 17), Bryant remained a temporary brewer. Thus, he was ineligible for certain benefits, including added job security, accorded to permanent brewers by the Agreement (A. 17).

Bryant does not contend that his former Employer, Falstaff, discriminatorily applied the disputed contract provisions (R. 310). Also, he admits that similarly situated white employees have failed to advance from temporary to permanent status because they have not fulfilled the industry length of service requirement (R. 306).[3]

[3] Although the second amended complaint alleges that some white employees reached permanent status by working 45 weeks in 2 calendar years (A. 17), Bryant stated in his answers to Falstaff's interrogatories that he knows of only 3 whites who reached permanent status without complying with the industry length of service requirement. He acknowledges that these employees reached permanent status in 1958 (R. 296-97).

This fact is said to be irrelevant to his theory of the case (R. 306). Under Bryant's view, the alleged Title VII violation arises from a coalescence of three factors: (1) A past discriminatory exclusion of Blacks from the California brewing industry (A. 16-17); (2) changed circumstances in California's brewing industry, such as automation, improved brewing methods and consolidation of breweries, which have lessened the demand for labor (A. 16; R. 304-05); and (3) the collective bargaining agreement's restrictive seniority and referral provisions (A. 16-17).

For some time, economic conditions in the brewing industry have made it difficult for temporary workers in Northern California to complete forty-five weeks of service in one calendar year and achieve permanent status. This fact is suggested by Bryant's employment experience. He was first employed by Falstaff on May 1, 1968 (A. 11, 17). From that date until early 1974, he worked intermittently at Falstaff's San Jose and San Francisco plants (R. 290-94, 304; A. 17). Apparently his layoffs were frequent and lengthy (R. 290-94, 314). In March, 1974, Bryant was referred out of Respondent Local 856's hiring hall for employment at Petitioner Theodore Hamm Co. (R. 293; A-18).[4] Bryant contends that his "on and off" employment with Falstaff was caused by the alleged discriminatory provisions of the collective bargaining agreement. He states that white workers were earlier

[4] By 1975, both Theodore Hamm and Falstaff had ceased operations in Northern California, leaving Petitioner General Brewing Co. as the single brewery remaining in the San Francisco area until 1977, when it too closed its plant. Bryant's employment status after April 25, 1974 is not disclosed by the record. There are 4 breweries currently operating in Southern California: Miller Brewing Co., Joseph Schlitz Brewing Co., Anheuser-Busch, Inc. and Pabst Brewing Co. These companies are no longer represented in collective bargaining by the California Brewers Ass'n, but deal directly with Teamster Locals 896 and 1007. The Teamster Brewery & Soft Drink Workers Joint Board of California is no longer in existence.

allowed to accumulate seniority credits while he and other Blacks were discriminatorily excluded from employment (R. 307). Since it is now said to be "impossible" for employees to satisfy the forty-five week service requirement (R. 311), the collective bargaining agreement unlawfully perpetuates past discrimination (R. 309; A. 18).

2. *Character of the Disputed Collective Bargaining Provisions*

Although Bryant alleges some instances of direct discrimination,[5] his second amended complaint principally attacks the collective bargaining agreement's seniority and referral provisions (§§ 4, 5). In essentially their present form (A. 27-41),[6] these provisions have been included in successive agreements for nearly twenty-five years (R. 7, 316). Their administration is subject to Section 55 of the Agreement which prohibits discrimination "against any individual because of his race, color, religion, sex, or national origin with respect to opportunity for or tenure of employment . . ." (R. 14, § 55). Sections 4 and 5 of the Agreement afford employees working as brewers, bottlers, drivers, shipping and receiving clerks and checkers job security in a cyclical in-

[5] For example, Bryant alleged that whites with inferior seniority and referral rights were referred before him by Local 856, thus delaying his employment at Theodore Hamm in 1974 (R. 453). He also alleged disparate application of the 45 week industry service requirement (R. 453). *But see* note 3, *supra*. In addition, Bryant claims he suffered wage discrimination in 1973 (R. 297), and that he was denied promotion to a nonunit lab technician's job in 1972 (R. 298). These instances of alleged direct discrimination are beyond the scope of this Court's Writ of Certiorari.

[6] The Joint Board/Association Agreement for 1970-73 was attached to Bryant's October, 1973 complaint (R. 14). At the time suit was initiated, however, the 1973-76 agreement had just been signed. Sections 4 and 5 relating to seniority and referral were not changed by subsequent Agreements.

dustry where employment fluctuations are frequent. Indeed, Bryant "basically agrees that there should be a system [though not the present system] which extends recognition to length of service within the multi-union —multi-employer unit . . ." (R. 306).

(a) *Brewery Structure.*—The structure reflected by Sections 4 and 5 is virtually the same at each establishment operated by the seven brewery Employers signatory to the Agreement. In the broadest outline, brewery establishments are organized along departmental lines. Beer and malt beverages are brewed, aged and finished in the brewing department by brewers and apprentices. To the extent the product is to be packaged in kegs, this operation will be performed in the brewery department (R. 14, § 2(a)(1)). If, however, the product is to be packaged in bottles or cans, the packaging operation will be performed by bottlers in the bottling department (R. 14, § 2(a)(2)). The product is readied for shipment to customers in the shipping department, where receiving and warehousing are also accomplished (R. 14, § 2(a)(4)). Checkers and shipping and receiving clerks work in this department. In those establishments still affording direct delivery service,[7] drivers and helpers in the delivery department will physically transport the product to customers by motor vehicle (R. 14, § 2(a)(3)).

(b) *Classifications.*—Seniority in the brewing industry is exercised within job classifications which correspond to the departmental structure of individual brewery establishments. Each establishment maintains separate seniority lists for brewers, bottlers, drivers, shipping and receiving clerks and checkers (A. 30-31, § 4(c)). Ap-

[7] Generally speaking, the work of the delivery department is now performed by independent distributors which are covered by a different collective bargaining agreement. It is instructive to note that the wage rate schedule for the Agreement in issue no longer carries rates for delivery department employees (A. 42).

prentice brewers (R. 14, § 34) are carried on their own plant seniority list (A. 31, § 4(c)(5)). Unlike other employees, apprentices accrue seniority only at the single brewery establishment where they are employed (A. 33, § 4(f)). Except for apprentices, an employee's relative position on the establishment seniority list is determined by both establishment and industry service in his classification. Not all establishment and industry service is counted in calculating seniority rankings, however.

(c) *Seniority Tiers Within Classifications.*—"For the purposes of seniority," the Agreement establishes within each job classification two or more classes or tiers. In the bottling department, bottlers may be permanent or temporary. Brewers, drivers, shipping and receiving clerks and checkers are classed as permanent, temporary or new employees (A. 27, § 4(a)). As employees progress from the temporary to permanent tiers, for instance, they achieve a higher wage rate (A. 42) and improved employee benefits (e.g., R. 14, §§ 15, 54). Advancement between the new, temporary and permanent tiers also affords an advancing employee a higher establishment seniority ranking in his job classification (A. 30, § 4(c)). On classification seniority lists, other than those maintained for bottlers and apprentice brewers, permanent employees enjoy the highest seniority ranking, followed by temporary employees and then by new employees (A. 30-31, § 4(c)(1)-(3)). Permanent bottlers are ranked above temporary bottlers on a separate seniority list in each establishment (A. 31, § 4(c)(4)).

Progression between the new, temporary and permanent tiers is entirely a function of industry service. To achieve permanent status, an employee must complete forty-five weeks of employment under the Agreement in one classification in one calendar year as an employee of the brewing industry in California (A. 27, § 4(a)(1)). Different rules prevail for apprentices and bottlers. Ap-

prentice brewers achieve permanent status upon completion of their two-year indenture (A. 28, § 4(a)(3); R. 14, § 34(b)), while bottlers become entitled to the full wage rate and permanent status after they have worked 1600 hours in a calendar year (A. 27, § 4(a)(1)). All bottlers who have not achieved permanent status are temporary bottlers (A. 28, § 4(a)(2)). In other classifications, temporary employees are those who have worked under the Agreement for at least sixty working days in the preceding calendar year (A. 28, § 4(a)(2)). "A new employee is any employee who does not qualify as a permanent employee, a temporary employee or an apprentice . . ." (A. 28-29, § 4(a)(4)).[8]

While an employee's competitive status seniority is determinable in part by his industry service, his plant seniority rights vis-a-vis employees having the same industry status (i.e., within the same tier) depend on his establishment service. This is true of all job classifications, whether the employee involved holds permanent, temporary or new status. Within each status ranking or tier of the classification seniority list, employees are arranged in descending order of their plant seniority which is calculated according to their unbroken establishment service in the tier.

For example, the plant seniority of a permanent brewer dates from the first day of his employment as a permanent brewer or apprentice in the establishment

[8] An employee's status and industry seniority are lost upon his voluntary quit or valid discharge (A. 29, § 4(a)(5), (6)). Permanent status is lost if the employee is not employed under the Agreement for any consecutive two-year period which will be extended for incapacity (A. 29, § 4(a)(5)). Temporary status is lost if the employees does not work under the Agreement for one year (A. 29, § 4(a)(6), A. 34-35, § 4(1)(4)), and "a new employee who fails to qualify for transfer to temporary employee status at the end of a year shall lose his status as a new employee" (A. 30, § 4(a)(7)).

during his current period of unbroken plant service (A. 31). Excluded from the calculation would be any service as a temporary or new brewer, any prior establishment service as a permanent brewer if followed by a break in that service, any service in another establishment (other than that which qualified him as a permanent brewer), and any service in another job classification. The plant seniority of a temporary or new employee is also measured from the first day of employment in his job classification as a temporary or new employee, respectively, during his current period of unbroken plant service (A. 31-32). As with permanent employees, therefore, seniority for temporary and new employees is determined by length of tier service in their job classifications within the establishment.

(d) *Layoff and Rehire.*—An employee's position on the establishment seniority list for his classification governs important job protection rights. Employees are laid off from the bottom of the seniority list, "and the first employee on the seniority list of the establishment who is not working in the establishment shall be the first rehired . . ." (A. 30, § 4(c)). In each job classification, then, employees are laid off in ascending order of their plant seniority within tiers. This means that the most junior new employee is first laid off in each classification. After all new employees are laid off in seniority order, the most junior temporary employee in the classification then becomes subject to layoff. Permanent employees are not laid off while temporary employees in the same job classification are working. For the junior-most permanent employee in establishment service holds a higher seniority ranking than the most senior temporary employee in the same job classification. Local Unions are required to dispatch employees for rehiring in reverse order of their layoff (A. 37, § 5(c)(1)).

(e) *"Bumping" Rights.*—Moreover, achievement of permanent status through industry service affords employees

job security beyond single establishments. Under Section 4(b) of the Agreement (A. 30),

> "A permanent employee who has been laid off . . . may be dispatched—if such employee so desires—for work in any establishment of any Individual Employer in the local area of his last employment and shall have the right to replace—as of Monday—the temporary employee or new employee with the lowest plant seniority therein employed regardless of anything in this Agreement to the contrary." [See also A. 35 relating expressly to bottlers.]

The "bumping" provisions are administered in accordance with Section 5(h) of the Agreement (A. 41) which requires individual Employers to notify the Local Union hiring hall each week by 12:00 A.M., Thursday, of employees to be laid off at the end of the week and of their hiring needs for the next week. By 12:00 A.M., Friday, the Local Union will notify the Employer of the number of employees to be dispatched on the following Monday to displace new and/or temporary employees, as well as the names of employees it has contacted and dispatched up to that time.

(f) *Referral Priorities.*—Consistent with their "bumping" rights, permanent employees who are out of work are entitled to referral priorities on dispatch from the hiring hall. After employees holding seniority in individual establishments are dispatched to their Employers, the order of referral for brewers, drivers, shipping and receiving clerks and checkers is as follows (A. 37-38, § 5(c)(2)): unemployed permanent employees registered in the established area, unemployed temporary employees registered in the established area, registered permanent employees who have been laid off and desire dispatch in another classification (A. 34, § 4(k)), and thereafter new employees who may be unemployed. Subject to re-employment and "bumping" rights, the order of referral

for bottlers requires that registered permanent bottlers be dispatched first, permanent employees registered in other classifications be next dispatched, and temporary bottlers be dispatched last (A. 37-38, § 5(c)(2)).

Within each of the permanent, temporary and new tiers, employees are dispatched on the basis of their length of service in the industry in California (A. 37-38, § 5(c)(1)(4)). Section 5(c)(6) of the Agreement provides with respect to the foregoing dispatch rules (A. 39),

> "The seniority privileges protected by subsection '(c)(1) and (2)' hereof may be exercised only if such vacancy is to be filled for thirty-seven and one-half (37½) straight-time hours (30 hours in the case of Bottlers) or more and if the person with seniority reports for such work within forty-eight (48) hours of the existence of the vacancy."

If vacancies remain after employees with seniority have been dispatched, the Local Union will then dispatch applicants who have registered for employment in the following order: applicants with experience in the work in California, with those having the most experience being referred first; applicants having acquired experience in the work elsewhere, also in descending order of their experience; and applicants with no experience in the chronological order in which their applications were filed (A. 38, § 5(c)(3)). The Agreement obligates Local Unions to administer its provisions without regard to considerations of union membership or activity, and to "exercise the responsibility of referring workers to employment and operating employment offices therefor in accordance with law . . ." (A. 39-40, § 5(e), (f), (g)).

B. Proceedings In The Court of Appeals

An appeal to the Ninth Circuit Court of Appeals was taken on November 14, 1974, from the District Court's

judgment dismissing the complaint (R. 524). The issue briefed and argued initially by the parties was whether the procedures complained of by Bryant were in the nature of legitimate "last hired, first fired" plant seniority provisions, as the District Court concluded (585 F.2d at 424, Pet. App. 5), or whether they constituted classification seniority provisions having an allegedly prohibited "lock-in" effect said to perpetuate past hiring discrimination. In this regard, Bryant stated the central issue on appeal in these terms: "Does a seniority and referral system which does not discriminate on its face, but which nevertheless serves to perpetuate past discrimination in hiring, violate Federal law?" (Appellant's Opening Brief, Civ. No. 75-1263, 9th Cir., dated April 21, 1975.)

While the appeal was pending, this Court issued its decision in *International Brotherhood of Teamsters (T.I.M.E.-D.C.)* v. *United States*, 431 U.S. 324 (1977), holding that a racially neutral classification seniority system qualifies for the protection afforded "bona fide seniority systems" by Section 703(h) of the Act, even though it may perpetuate past hiring discrimination. Consequently the Court of Appeals accepted supplemental briefs from the parties addressing the issues raised by *Teamsters*. Until that time, no party had suggested that the contract provisions under attack constituted anything other than a seniority system. Nevertheless, without additional fact-finding, a panel of the Ninth Circuit Court of Appeals designated "the critical question" as "whether the 45-week requirement, found in section 4 of the collective bargaining agreement, is in fact a seniority system or part of such a system . . . ." 585 F.2d at 426 (Pet. App. 8). The panel then proceeded to hold, Circuit Judge Trask dissenting, that while the Agreement contains a seniority system, the forty-five week industry service requirement for attaining permanent status is not part of it. 585 F.2d at 427 (Pet. App. 12).

In holding that the forty-five week industry service provision was separable from the seniority system, the panel majority believed that the provision lacks the "fundamental component" of a seniority system. It stated that "employees junior in service to the employer *may* acquire greater benefits than senior employees" because "the acquisition of permanent status *may* be independent both of the total time worked and the overall length of employment . . . ." 585 F.2d at 426 (Pet. App. 9, emphasis added). On the basis of this dual hypothesis, the panel majority thought that the instant case could be distinguished from *Teamsters*, *supra*, 431 U.S. 324. That the challenged system was somehow considered susceptible to "discriminatory application" also distinguished it from a normal seniority system. 585 F.2d at 427 (Pet. App. 11). For these reasons, the panel majority concluded that the forty-five week industry service provision is a classification device different from a seniority system. 585 F.2d at 427 (Pet. App. 12).

Since the challenged provision was found not to be part of a seniority system, the panel majority held that Bryant was not required to disprove its bona fides. "Instead, the normal rule applies that 'a *prima facie* Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.'" 585 F.2d at 427 (Pet. App. 12). The District Court's judgment was reversed and the cause remanded. Subsequently a petition for rehearing was denied.

SUMMARY OF ARGUMENT

1. Seniority arrangements first emerged in the railroad industry in the 1880's, and became well established in that industry during the World War I period of Federal controls. In industries other than transportation, the seniority principle evolved unevenly. The advent of mass production manufacturing, the Great Depression, Government action during World War II, and the enactment of laws encouraging collective bargaining all contributed to the full development of seniority concepts. By 1963, seniority arrangements were found in virtually every collective bargaining agreement. Then, as now, seniority provisions assumed an almost infinite variety; typically length of service was qualified by variables necessitated by the character of the enterprise or the nature of the collective bargaining relationship. Nothing in the law compelled "a bargaining representative to limit seniority clauses solely to the relative lengths of service of the respective employees . . . ." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953); *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 526-28 (1949).

2. This was the state of the seniority principle when Congress began its consideration of fair employment practices legislation in 1963. Nothing in the legislative history of Title VII suggests that Congress was concerned with the technical features of seniority systems. Rather Congress viewed seniority in a broad sense, that is, as a system of beneficial employment rights. It then undertook to assure that incumbent employees having such rights could continue to exercise them. *International Brotherhood of Teamsters (T.I.M.E.-D.C.)* v. *United States*, 431 U.S. 324, 354 (1977). The congressional judgment underlying Section 703(h) "was that Title VII should not outlaw the use of existing seniority lists and

thereby destroy or water down the vested seniority rights of employees . . . ." *Id.* at 352.

This unmistakable legislative purpose, together with Congress' apparent disinterest in the mechanics of various seniority systems, furnishes compelling evidence that bona fide seniority rules need not conform to any set standard or norm to qualify for Section 703(h)'s protections. Congress recognized the existence of seniority systems and seniority rights in Title VII. It chose to accept them as they had evolved in collective bargaining, without expressing a preference for any particular system. *Teamsters* v. *United States*, *supra*, 431 U.S. at 355 n.41; cf. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 288 (1946). Thus, all bona fide seniority systems are protected by Section 703(h).

3. In view of Congress' clear purpose to allow for the full exercise of pre-existing seniority rights, the conclusion is inescapable that Congress meant to protect in a particular case the entire seniority system. See *Alexander* v. *Aero Lodge 735, Int'l Ass'n of Machinists*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). "Seniority systems" are comprised of contractual rules that serve to establish and control preferential or beneficial employee rights based upon "time worked." At minimum, bona fide rules determining the scope of the seniority unit, the acquisition or loss of seniority, or the measurement of seniority within the applicable unit are immunized by Section 703(h). These seniority rules establish orders of priority among competing employees, as reflected on seniority lists, and they cannot be changed by the Courts without causing a reshuffling of seniority expectations that Congress was determined to avoid. It makes no difference whether these rules ascribe controlling effect to total length of service, or some lesser measure of time worked, because such variations in seniority principles were well known when Congress acted to protect *all* bona fide seniority systems in Section 703(h).

The forty-five week industry service rule for achieving permanent status governs many competitive seniority rights, including layoff, recall, "bumping" and priorities in referral for employment, as well as important beneficial seniority rights. Thus, it is "directly linked" to the seniority system (*Patterson* v. *American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1978)), from which it can no more be separated than could the rule establishing separate seniority units for road and city drivers be separated from the seniority system considered in *Teamsters* v. *United States*, *supra*, 431 U.S. 324. The instant case demonstrates the clear danger of dissecting established contractual systems to determine whether each component, by itself, expresses the requisite fidelity to length of service. Invalidation of a particular contractual provision, not thought to be a seniority rule because it qualifies the acquisition, measurement or application of seniority, can profoundly alter employee seniority expectations.

The Ninth Circuit's effort to analogize the forty-five week industry service rule to classification devices, such as ability or educational standards, is unconvincing. The forty-five week rule is based solely on time worked, and vests in employees certain defined expectations. It has nothing in common with classification devices used by employers to inform their discretion in employee selection decisions. Like seniority rules generally, the forty-five week rule limits the Employers' discretion to pick and choose among employees. Equally unconvincing is the Court of Appeals' suggestion that, unlike a true seniority system, the forty-five week rule can be subject to discriminatory manipulation. This suggestion relates to the "bona fides" of the seniority system; it has no bearing on whether the forty-five week rule is part of the system.

4. The Respondent's "past discrimination perpetuated" theory presupposes that the attainment of permanent status is a function of continued industry employment. Not only must he show that older employees built seniority while he was allegedly excluded from the industry, but a positive correlation between length of service and the attainment of permanent status must be assumed if Bryant is to make out his claim that he would have satisfied the forty-five week rule "but for" the past discrimination he alleges. Cf. *Watkins* v. *United Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975).

In any event, the correlation between length of service and advancement to the permanent tier within job classifications is apparent from the operation of the seniority referral and plant seniority rules in the Agreement. A temporary employee's employment will become more regular as his time in the industry and seniority increase. Since the forty-five week rule is satisfied by industry, not simply establishment service, increased regularity in employment will lead to the attainment of permanent status. On this record, little more can be said than the structure of the seniority system, including the forty-five week rule, is designed to reward length of service. The Ninth Circuit erred in deciding that Section 703(h) was inapplicable without a trial. See *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Teamsters* v. *United States*, *supra*, 431 U.S. at 375.

The Court below unduly emphasized, as a supposed departure from "normal" seniority principles, the possibility that one temporary employee might be referred to an establishment where production is expanding, and complete forty-five weeks of employment in a calendar year, while another temporary employee with longer industry service might not be so fortunate and suffer layoff elsewhere. Yet this situation, which the Agreement's seniority referral rules are designed to minimize, indicates only that plant seniority can be more valuable in one area than another due to prevailing market con-

ditions. Few seniority systems provide for a fully automatic accrual of rights. Often allowances will be made for variables, such as layoffs, that serve to interrupt the accrual of seniority and delay realization of the advantages dependent thereon. Cf. *Tilton* v. *Missouri Pac. R.R.*, 376 U.S. 169 (1964).

5. As they have developed in collective bargaining, seniority provisions reflect various length of service criteria which are seldom absolute. *Ford Motor Co.* v. *Huffman, supra*, 345 U.S. at 338-39. Variations in, and qualifications of, length of service as a controlling factor are common. *Aeronautical Indus. Dist. Lodge 727* v. *Campbell, supra*, 337 U.S. at 526-27. Moreover, the forty-five week rule has numerous industrial counterparts (e.g., *Gerber Prods. Co.*, 12 N.W.L.B. 74 (1943)), so it cannot be considered an anomaly. Not only have the parties viewed the system challenged here as a "seniority system" (A. 27), but it is similar to seniority systems in effect elsewhere in the brewery industry. *New Jersey Brewers Ass'n*, 18 N.W.L.B. 114, 115-16 (1944). In these circumstances, the Court of Appeals' decision represents an unprecedented intrusion into private collective bargaining that Congress could not have countenanced. See *United Steelworkers* v. *Weber*, 47 U.S.L.W. 4851, 4854 (U.S., June 27, 1979).

ARGUMENT

I.

CONGRESS INTENDED TO GRANT A MEASURE OF IMMUNITY TO ALL SENIORITY SYSTEMS BY ENACTING SECTION 703(h) OF THE CIVIL RIGHTS ACT OF 1964, AND IT IS NOT FOR THE COURTS TO VITIATE THIS CHOICE BY DRAWING NARROW DISTINCTIONS BETWEEN VARIOUS CONTRACTUAL SYSTEMS ACCORDING TO THE SCOPE OF THE SENIORITY UNITS THEY ESTABLISH, OR HOW SENIORITY IS ACQUIRED OR MEASURED WITHIN EACH UNIT

A. Development Of The Seniority Principle In Collective Bargaining

1. *Emergence of Seniority*

"[S]eniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry . . . ." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 526 (1949). It is unsurprising, therefore, that development of various seniority concepts has largely paralleled the growth of collective bargaining.[9] The seniority principle has developed unevenly. "Circumstances of some industries caused a rapid advance. Those of other industries caused a slower advance and those of still others resulted in non-use of the principle." J. Lapp, *How To Handle Problems of Seniority* 7 (1946). But, generally, events tending to threaten employment security and changes in the law have given much impetus to the growth of seniority, as unions have sought to cope with these developments through collective bargaining.

[9] F. Harbison, Seniority Problems During Demobilization and Reconversion 7 (Indus. Rel. Sect., Princeton Univ., 1944).

"Seniority first emerged in the railroad industry of the 80's, in an atmosphere of stratified opportunity and precarious tenure . . . ." Comment, *Seniority Rights In Labor Relations*, 47 Yale L.J. 73, 74 (1937). It originated in the operating crafts, spread to the shopcrafts, and then was adopted in railroad clerical agreements, after the latter employee groups became organized. J. Lapp, *op. cit. supra*, at 7-8. The evolution continued into the World War I period when, under the wartime administration of the U. S. Director General of Railroads, seniority became firmly established in the industry.[10] In industries other than transportation, during the prewar period and well into the 1920's, employment was characterized by rapid turnover due to voluntary resignations by employees hoping for greater opportunity elsewhere. This economic climate was not conducive to seniority implementation.[11]

2. *Factors Contributing to Seniority Development*

During the Depression Era, 1929-1939, economic conditions changed dramatically. The voluntary resignation rate declined until it represented only 10-15 percent of employee separations, with the remainder being involuntary layoffs and discharges.[12] Employment "security" rather than "opportunity" became the dominant theme of the labor market. These changes had a profound impact on collective bargaining. Two comparable studies of collective bargaining agreements disclosed that, while roughly one out of three agreements negotiated between 1922 and 1929 contained layoff restrictions, two out of three entered into between 1933 and 1939 contained such

[10] Comment, *supra*, 47 Yale L.J. at 74; United States R.R. Admin., General Order No. 27, May 25, 1918.

[11] Address by S. Slichter, *Layoff Policy*, Ninth Ann. Conf. on Ind. Rel., Univ. of Mich., April 12-15, 1939, on file U.S. Dep't of Labor Library.

[12] *Id.* at 1.

restrictions.[13] By 1937, in fact, the seniority principle had gained a strong foothold in the brewery industry among others. Comment, *supra*, 47 Yale L.J. at 74 n.6.

Also contributing to the evolutionary growth of seniority was the emergence of mass-production industries having simple, mechanized processes that created a demand for semi-skilled and easily replaced labor.[14] Factory workers lack the security that comes from the possession of a special skill, and their job-oriented training is not readily transferable to different enterprises. Thus, increased union activities and organizational success were followed by wide adoption of seniority arrangements in manufacturing labor agreements.[15] This process accelerated after the Wagner Act[16] became law in 1935, and continued through World War II under conditions of expanding output and employment. Millions of workers in important industrial sectors became covered by collective bargaining agreements containing seniority provisions. See J. Lapp, *op. cit. supra*, at 9; R. Aronson, Layoff Policies and Practices, at 9 (Indus. Rel. Sect., Princeton Univ., 1950).

The trend toward affording seniority protections received encouragement from statutory reemployment rights for veterans. Selective Training and Service Act of 1940, § 8, 54 Stat. 840, as amended, 38 U.S.C. § 2021 (1976). Decisions by the National War Labor Board directing the acceptance of seniority clauses, including

[13] *Id.* at 2.

[14] A. Mowatt, Seniority Provisions In Collective Agreements, at 1 (Dep't of Labor, BLS 1938).

[15] *Id.* at 2. See also Taylor, *Seniority Concepts*, in "Arbitration Today" 129, 133 (Proceedings of the Eighth Ann. Meeting, National Academy of Arbitrators 1955).

[16] National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-60 (1976). Seniority has long been held a mandatory subject of bargaining under the Act. E.g., *NLRB* v. *Westinghouse Air Brake Co.*, 120 F.2d 1004, 1006 (3d Cir. 1941).

some very similar to the contract provisions in issue here, also influenced adherence to the seniority principle.[17] E.g., *New Jersey Brewers Ass'n*, 18 N.W.L.B. 114 (1944); *Gerber Prods. Co.*, 12 N.W.L.B. 74 (1943). In 1947, Congress abolished the closed shop.[18] Unions that had earlier controlled hiring, and had rejected seniority in favor of work-sharing among their members, thereafter found it expedient to develop seniority arrangements.[19]

3. *Modern Seniority Arrangements*

By the early 1960's, the seniority principle had become so important that it was embodied in virtually every collective bargaining agreement. B. Aaron, *Reflections On The Legal Nature And Enforceability Of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962). Then, as now, "seniority provisions assume[d] an almost infinite

[17] Slichter, Healy & Livernash, *The Impact of Collective Bargaining On Management* 105 (1960).

[18] Labor Management Relations Act of 1947, § 8(a)(3), 61 Stat. 140, 29 U.S.C. § 158(a)(3) (1976).

[19] The building trades unions in the construction industry were among the last to adhere to the seniority principle. See Note, *Seniority Clauses In Labor Contracts*, 32 Iowa L. Rev. 107, 108 (1946). The first seniority system in the construction industry was established on April 2, 1948, when the International Brotherhood of Electrical Workers, Local 134, entered into an area agreement with the Electrical Contractors Association of Chicago, providing for the referral of craftsmen who had established seniority in accordance with length of service criteria. See Address by L. Asher, Joint Labor-Management-Public Conf. on Seniority, Univ. of Wisc., Oct. 21, 1950, on file U.S. Dep't of Labor Library. In the following years, referral rules based on length of service were often adopted by construction trades unions, even though seniority remained less prevalent in construction than in other segments of the economy. U.S. Dep't of Labor, Bureau of Labor Statistics, *Administration of Seniority* (Bull. 1425-14), at 2 (1972). See also G. Cooper & R. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring And Promotion*, 82 Harv. L. Rev. 1598, 1602 (1969); J. Gardner, *An Overview of the Civil Rights Act of 1964 And Its Effect On Labor Organizations—A Look Ahead*, 17 Loy. L. Rev. 1, 4-5 (1970).

variety," ranging "from absolute rigidity to great flexibility, and from relative simplicity to extreme complexity . . . ." *Id.* at 1534. This Court had recognized that "there are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority . . . ." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell, supra*, 337 U.S. at 526.

Relatively few "straight" seniority systems, in which length of service alone governs layoff, recall, promotional and other preferential rights, existed in the industrial sector. Far more prevalent were "modified" seniority systems, in which length of service was qualified by varibles necessitated by the character of the enterprise or the nature of the collective bargaining relationship.[20] See *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). Nothing in the law compelled "a bargaining representative to limit seniority clauses solely to the relative lengths of service of the respective employees . . . ." *Id.* at 342. Indeed, this Court had held that the rights of seniority guaranteed the veteran by the Selective Service Act, § 8, 54 Stat. 840 (1940), as amended, 38 U.S.C. § 2021 (1976), must be determined by looking "to the conventional uses of the seniority system in the process of collective bargaining . . . ." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell, supra*, 337 U.S. at 526. There, in rejecting Campbell's claim that the seniority system's departure from strict length of service criteria violated the Act, Mr. Justice Frankfurter stated:

> "To draw from the Selective Service Act an implication that date of employment is the inflexible

[20] J. Lapp, *op. cit. supra*, 14-29; U.S. Dep't of Labor, Bureau of Labor Statistics, *Seniority In Promotion and Transfer Provisions* (Bull. 1425-11), at 4-10 (1970). See also F. Silbergeld, *Title VII And The Collective Bargaining Agreement: Seniority Provisions Under Fire*, 49 Temp. L.Q. 288, 290-91 (1975-76).

> basis for determining seniority rights as reflected in layoffs is to ignore a vast body of long-established controlling practices in the process of collective bargaining of which the seniority system to which that Act refers is a part . . . ." [*Id.* at 527.]

This was the state of the seniority principle, as it had evolved in collective bargaining, when Congress began its consideration in 1963 of H.R. 7152, the bill that would eventually become Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), and similar legislative initiatives. Moreover, seniority provisions that discriminated directly and invidiously on racial grounds had been declared unlawful as a breach of the bargaining representative's duty of fair representation [21] implied from the labor laws.[22] On the other hand, facially neutral seniority provisions that applied equally by their terms to all races were lawful and valid, even though they did not affirmatively undertake to remedy past racial discrimination in hiring. *Whitfield* v. *United Steelworkers, Local 2708*, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959).[23]

B. Congress Meant To Protect Employee Rights That Had Vested Under Existing Seniority Systems

In Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1976), Congress recognized the existence of seniority systems and seniority rights, just as it had in the Selective Service Act of 1940, § 8, 54 Stat. 840, as amended, 38 U.S.C. § 2021 (1976). See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 288 (1946). Neither statute defines the term "seniority." Plainly, then, Congress recognized in both laws the operation of seniority systems as part of the process of collective bargaining, *Aeronautical Indus. Dist. Lodge 727* v. *Campbell, supra*, 337 U.S. at 526, and chose to accept them as they stood without expressing a preference for any particular system. *International Brotherhood of Teamsters (T.I.M.E.-D.C.)* v. *United States*, 431 U.S. 324, 355 n.41 (1977). There is surely no indication that Congress meant for the Courts, in Title VII cases, to strike down existing systems of seniority whenever it appeared that accumulated length of service alone was not the inflexible basis for determining seniority rights.

It must be emphasized that, whether a seniority system is "straight" or "modified," whether length of service is the sole determinant of job rights or is qualified by variables agreed to in collective bargaining, employees have specific vested rights and expectations under the system. It is these rights and expectations that Congress chose to protect in Section 703(h). *EEOC* v. *E. I. duPont de Nemours & Co.*, 445 F. Supp. 223, 249 (D. Del. 1978). As this Court concluded in *Teamsters*:

> "[T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." [431 U.S. at 353.]

This critical point serves to highlight one aspect of the error made by the Court below in striking down the forty-five week industry service requirement for achiev-

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[21] E.g., *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192 (1944); *Rolax* v. *Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951); *Brotherhood of Locomotive Firemen* v. *Tunstall*, 163 F.2d 289 (4th Cir.), cert. denied, 332 U.S. 841 (1947). See also *Syres* v. *Oil Workers, Local 23*, 350 U.S. 892 (1955), reh'g denied, 350 U.S. 943 (1956).

[22] National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (1976); Railway Labor Act, § 2, Ninth, 45 U.S.C. § 152, Ninth (1976).

[23] See D. Stacy, *Title VII Seniority Remedies In A Time Of Economic Downturn*, 28 Vand. L. Rev. 487, 493 (1975), where the author concluded: "The *Whitfield* decision was considered to be the conventional wisdom by the forces who in the early sixties successfully pressed for the passage of the 1964 Civil Rights Act . . . ."

ing permanent status. The panel majority became preoccupied with an attempt to categorize the forty-five week provision, using what it thought to be an appropriate norm for determining whether the provision was a seniority system or part of a seniority system. As a result, the panel majority failed to note that the forty-five week provision is the linchpin on which the most important seniority rights of brewery employees rest. Nor did it consider that elimination of the provision would necessarily lead to a rearrangement of seniority expectations, as reflected in existing plant seniority lists and seniority referral lists maintained by Local Unions, across an entire multi-employer, multi-union bargaining unit. In short, the decision below concentrates too much on resolving, in the abstract, what a seniority system theoretically should be, and too little on the seniority rights of incumbent employees that Congress was determined to protect in Section 703(h).

Nothing in the legislative history of Title VII suggests that Congress was concerned with the technical features of seniority systems, such as the definition of the unit of seniority, acquisition of seniority, measurement of seniority within the applicable unit, or variations from cumulative length of service as the controlling determinant of seniority. Rather Congress viewed seniority in a broad sense, that is, as a system of beneficial employment rights.[24] It then undertook to assure that employees having such rights could continue to exercise them. *Teamsters* v. *United States*, *supra*, 431 U.S. at 354. The course Congress eventually took became discernible early in its consideration of fair employment practices legislation. For example, in testifying before the Senate Subcommit-

[24] Cf. Aaron, *supra*, 75 Harv. L. Rev. at 1540. See also F. Meyers, *Seniority As Security: A Rationale*, in 89 Monthly Lab. Rev. 127 (Feb. 1966): "The more useful analytic meaning of seniority, then, seems to be the affirmative expression of a property-like relation of the worker to a definable set of work opportunities . . . ."

tee on Employment and Manpower, AFL-CIO President Meany urged Congress to avoid the "pitfall" of affording Negroes hiring and seniority preferences to compensate for past discrimination because "no individual white worker should be penalized for past practices in which he may have had no voice." [25]

Like other supporters of fair employment practices legislation, Mr. Meany did not see this "pitfall" in the Senate bills under consideration.[26] But on the House side, where the more important H.R. 7152 had been introduced on June 20, 1963,[27] opponents of the bill soon "charged that it would destroy existing seniority rights . . . ." *Teamsters* v. *United States*, *supra*, 431 U.S. at 350. The opponents' criticisms were variously stated; however, they uniformly expressed the fear that minorities would obtain special seniority rights boosting them ahead of incumbent whites.[28] The following statements in the Minority Report accompanying H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), are illustrative:

> "To millions of working men and women, union membership is the most valuable asset they own. It is designed to insure job security and a rate of pay higher than they otherwise would receive.

[25] *Hearings on S. 773, S. 1210, S. 1211 and S. 1937, Bills Relating to Equal Employment Opportunities, Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 155 (1963).

[26] *Id.* at 166.

[27] The various bills introduced in the 87th and 88th Congresses are described in summary fashion in EEOC, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 7-11 [hereinafter cited as "1964 Leg. Hist."] See also F. Silbergeld, *supra* note 20, at 293-97.

[28] 110 Cong. Rec. 486-88 (1964) (remarks of Senator Hill); 110 Cong. Rec. 2726 (1964) (remarks of Congressman Dowdy); 110 Cong. Rec. 5251 (1964) (remarks of Senator Talmadge); 110 Cong. Rec. 7091 (1964) (remarks of Senator Stennis).

> As none knows better than the union member, himself, these two benefits are dependent upon the system of seniority the unions have followed since their inception. Seniority is the base upon which unionism is founded. Without its system of seniority, a union would lose one of its greatest values to its members.'
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> * * * *
>
> "To disturb this traditional practice is to destroy a vital part of unionism. Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race . . . ." [1964 Leg. Hist. 2071.] [29]

After the addition of eighteen amendments, which are not pertinent to this case, H.R. 7152 passed the House on February 10, 1964. 110 Cong. Rec. 2804-05 (1964). It encountered much stiffer opposition in the Senate, including a filibuster lasting over three months. 1964 Leg. Hist. 3092. The Senate opponents also claimed that the bill would undermine vested seniority rights.[30] The bill's Floor Manager, Senator Clark, responded by introducing a letter, dated February 11, 1964, from UAW President Reuther maintaining that the bill's purpose was not to cause the layoff of white workers, but to make "future opportunities for employment . . . available to minorities previously discriminated against." At the same time,

[29] For the responses made by H.R. 7152's supporters to allay these fears, see H.R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess. (1963), in 1964 Leg. Hist. 2122, 2150; 110 Cong. Rec. 1518 (1964) (remarks of Congressman Celler); 110 Cong. Rec. 5423 (1964) (remarks of Senator Humphrey); 110 Cong. Rec. 6564 (1964) (remarks of Senator Kuchel); 110 Cong. Rec. 9113 (1964) (remarks of Senator Keating); 110 Cong. Rec. 11848 (1964) (remarks of Senator Humphrey).

[30] See authorities cited in note 28, *supra*.

Senator Clark introduced a rebuttal statement prepared by the U.S. Department of Justice which concluded that "Title VII would have no effect on seniority rights existing at the time it takes effect . . . ." "Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7206-07 (1964). Senator Clark then stated, "Mr. President, it is clear that the bill would not affect seniority at all . . . ." 110 Cong. Rec. 7207 (1964).

The Clark-Case interpretative memorandum, regarded as authoritative evidence of Congress' intent,[31] also stated that "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." 110 Cong. Rec. 7213 (1964). Similarly, in a series of written answers to questions proffered by Senator Dirksen as to the bill's meaning, Senator Clark indicated that "seniority rights are in no way affected by the bill . . . ." "[I]t will not require an employer to change existing seniority lists." 110 Cong. Rec. 7216-17 (1964).

Notwithstanding these assurances, it became necessary to accept amendments to the bill dealing expressly with seniority, among other subjects,[32] in order to secure sufficient votes to invoke cloture and end the filibuster. Known collectively as the Dirksen-Mansfield compromise, the amendments included language later enacted with minimal change as Section 703(h), 42 U.S.C. § 2000e-2(h) (1976). Senator Humphrey explained that the compromise language on seniority did "not narrow application

[31] *Teamsters* v. *United States*, *supra*, 431 U.S. at 350-51; *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 759-60 (1976); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434-36 (1971).

[32] 110 Cong. Rec. 12722-24 (1964). Another troublesome area dealt with by the amendments involved racial balance or preferential treatment. *Id.* at 12723. Subsection 703(j), 42 U.S.C. § 2000e-2(j) (1976), was exhaustively considered by this Court in *United Steelworkers (Kaiser Alum. & Chem. Corp.)* v. *Weber*, 47 U.S.L.W. 4851 (U.S., June 27, 1979) (Nos. 78-432, -435, -436).

of the title, but merely clarifies its present intent and effect." 110 Cong. Rec. 12723 (1964). In *Teamsters* v. *United States, supra,* 431 U.S. at 352, this Court concluded that Section 703(h) was drafted to insure that H.R. 7152 would not destroy "existing collectively bargained seniority rights," as feared by the bill's opponents.

Thus, the legislative history demonstrates that neither the proponents nor the opponents of Title VII expressed any interest in the mechanics of how seniority systems operated. Not only was no particular system preferred (*Teamsters* v. *United States, supra,* 431 U.S. at 355 n.41), no particular system was even mentioned.[33] Congress gave no thought to the formal attributes, or modes of operation, of the many types of seniority systems that had evolved through collective bargaining. Its sole purpose was to preserve the "property-like relation of the worker to a definable set of work opportunities," [34] as expressed in established, bona fide seniority rules, against attack under Title VII. This is compelling evidence that bona fide seniority rules need not conform to any set standard or norm to qualify for Section 703(h)'s protections, and that Congress intended to protect *all* bona fide seniority systems.

[33] The only exception appears to be the hiring hall referral system mentioned hypothetically in the Minority Report accompanying H.R. Rep. No. 914, 88th Cong., 1st Sess., 1964 Leg. Hist. 2071. As shown in Part II of this Argument, *infra* at pp. 44-46, the seniority referral mechanism in Section 5 of the Joint Board's Agreement (A. 36-41) plays an important role in assuring job security for brewery employees.

[34] F. Meyers, *supra* note 24, at 127.

C. Established, Bona Fide Seniority Practices Under Which Employee Job Rights Have Vested Are Immune From Attack

1. *Seniority Rules Are Protected*

As shown above, the measure of immunity Congress afforded "seniority systems" in Section 703(h) was the means it adopted to achieve its legislative goal of assuring that the contractually vested seniority rights of incumbent employees would not be watered down or destroyed by Title VII decrees. The conclusion is irresistible, therefore, that Congress intended to protect in a particular case the entire seniority system, consisting of all contractual rules that establish and control preferential or beneficial employee rights based upon "time worked." Obviously if the system's rules determining the scope of the seniority unit, the acquisition or loss of seniority, or the measurement of seniority within the applicable unit are voided, a reshuffling of seniority expectations is inevitable. This is the very diminution of established seniority rights that Congress so clearly wished to avoid in accordance with its determination that incumbent employees "guilty of no wrongdoing" should not be penalized. See *Sledge* v. *J. P. Stevens & Co.,* 585 F.2d 625, 652 (4th Cir. 1978), cert. denied, 60 L.Ed.2d 241 (1979).

As the Court below acknowledged, the Joint Board Brewery Agreement contains a "seniority system" under which employees enjoy vested seniority rights. 585 F.2d at 427 (Pet. App. 12). This much is undisputed. Important competitive priorities and eligibility for benefits are governed by seniority.[35] Nor can it be seriously dis-

[35] " 'Competitive status seniority' is used to determine priorities among employees for promotion, job security, shift preference, and other employment advantages. By contrast, 'benefit seniority' is used, without regard to the status of other employees, to determine the eligibility of a given employee for certain benefits, such as par-

puted that the forty-five week industry service rule for achieving permanent status is determinative of many of these seniority rights. At individual establishments, an employee's place on the classification seniority list is determined first by tier (permanent, temporary or new), and then by length of unbroken plant service within the tier (A. 30-32). Layoffs are made in seniority order from the bottom of the classification seniority list, while rehiring is accomplished in reverse order of layoff (A. 30). Bumping rights and priorities in referral for employment are held by permanent employees (A. 30, 37-38). In these circumstances, the Court of Appeals' holding that the forty-five week industry service rule is not part of the seniority system cannot be justified factually or legally.

In terms of its impact on employee seniority rights, the forty-five week rule is no different than any rule establishing the unit of seniority, determining how seniority will be acquired or lost, or measuring seniority within the applicable unit. Together with other seniority rules in the Joint Board Agreement, the forty-five week industry service requirement establishes orders of priority governing the entitlement of employees to fundamental employment rights. These orders of priority are reflected on establishment classification seniority lists and on hiring hall referral lists in the California brewing industry. Examined in this light, it is apparent that the forty-five week rule is "directly linked" to the seniority system. See *Patterson* v. *American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1978). It can be no more separated from the seniority system in the Joint Board Brewery Agreement than could the rule establishing different units of seniority for road and city drivers be separated from the seniority system considered by this Court in *Teamsters* v. *United States*, *supra*, 431 U.S. 324.

ticipation in a group life insurance plan . . . ." G. Cooper & R. Sobol, *supra* note 19, at 1601-02 n.1. By advancement to the permanent tier in their job classifications, brewery employees become eligible for supplemental unemployment benefits (R. 14, § 54) and industry vacations (R. 14, § 15). Thus, the 45-week industry service rule has implications for both competitive status and benefit seniority rights.

In *Teamsters*, this Court held that a system which established separate units of seniority for city and road drivers, and measured seniority within each unit according to length of terminal service, was bona fide and protected by Section 703(h), notwithstanding any tendency to perpetuate past hiring discrimination. The Court of Appeals in the instant case distinguished *Teamsters* because it thought that the seniority system considered there was significantly different than the brewery system under attack here. 585 F.2d at 427 (Pet. App. 10). Although there are features of both seniority systems that closely resemble one another in design and operation,[36] this is less important for Section 703(h) purposes than the fact that the provisions complained of in both systems controlled the disposition of established seniority rights. A successful attack on the forty-five week rule in the Joint Board Agreement will have an impact on the seniority rights of incumbent brewery employees no

[36] For example, the modified system seniority feature of the Southern Conference Road Supplement in *Teamsters*, 431 U.S. at 332 n.10, permitted laid-off road drivers to exercise their company road seniority at a foreign terminal to bump junior employees on the road board. Former city drivers at the foreign terminal who had transferred to the road board, thereby yielding their accrued seniority, were at a significant disadvantage in this competition. Road drivers who had earlier transferred between terminals without the protection of modified system seniority (i.e., without satisfying contractual requirements, 517 F.2d at 306 n.9) also had to compete on the basis of their terminal road seniority against laid-off drivers exercising their company road seniority. Under Section 4(b) of the Joint Board Brewery Agreement (A. 30), a permanent employee laid off from one establishment may exercise industry seniority at another establishment to bump a temporary or new employee. Neither system necessarily credits all affected employees with their total length or service.

less drastic than the impact the challenge to the separate seniority units considered in *Teamsters* threatened to have on the seniority rights of road drivers. This is the crux of the error made by the Court of Appeals.

However narrowly this Court's decision in *Teamsters* is construed, it interpreted Section 703(h) as expressing "the congressional judgment . . . that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees . . . ." 431 U.S. at 353. At minimum, this means that collectively bargained rules establishing orders of priority among competing employees, as reflected in seniority lists, cannot be stricken down by the Courts under Title VII, absent a finding that they are not "bona fide." It makes no difference whether these rules ascribe controlling effect to total length of service, or some lesser measure of time worked, in ordering priorities among employees. For such variations in seniority principles, tailored to fit specific employment situations and hammered out in collective bargaining, were already fixtures on the industrial scene when Congress enacted Section 703(h). E.g., *Ford Motor Co.* v. *Huffman, supra*, 345 U.S. 330; *Aeronautical Indus. Dist. Lodge 727* v. *Campbell, supra*, 337 U.S. 521. And, as noted, Congress extended a measure of immunity to *all* seniority systems.

2. *Lower Court Decisions*

To be sure, some of the lower Courts have exhibited confusion, particularly in promotional and transfer situations, in determining whether particular requirements are seniority rules or not.[37] In *Parson* v. *Kaiser Alum. & Chem. Corp.*, 575 F.2d 1374, on rehearing, 583 F.2d 132

[37] *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1193-94 (5th Cir. 1978), cert. denied, 99 S.Ct. 1020 (1979). Compare *Cotton* v. *Hinton*, 559 F.2d 1326, 1333 (5th Cir. 1977).

(5th Cir. 1978), cert. denied, 60 L.Ed.2d 1073 (1979), the Court of Appeals first acknowledged that rules for bidding on vacancies within departments are governed by seniority and protected by Section 703(h). It then proceeded to hold that a rule allowing transferees to bid only on entry level positions in other departments, and requiring them to occupy the bottom-level position for a ten-day trial period after transfer before becoming eligible to bid on higher level positions on the basis of plant seniority, "is a condition upon *transfer* wholly extraneous to the prevailing seniority system . . . ." 583 F.2d at 133. Initially finding that the vice of the provision is that it "gives the old seniority criterion a continuing discriminatory effect" (575 F.2d at 1388), on rehearing, the Court of Appeals sought to recover with the following reasoning:

> "[T]he central problem with the system of interdepartmental transfers . . . [is] the ten-day bottom entry requirement, the result of which is that employees can use their plant seniority to bid for jobs in a new department only if they are willing to take the risk of being frozen in an entry level position with lower pay for an indefinite amount of time because some other employee already in the new department and with more plant seniority bids for the vacancy after the required ten-day waiting period . . . ." [583 F.2d at 133.]

We will not pause to consider whether the Fifth Circuit's decision in *Parson* demonstrates fidelity to the legislative compromise in Title VII under which " 'management prerogatives and union freedoms . . . [would] be left undisturbed to the greatest extent possible.' " *United Steelworkers* v. *Weber, supra*, 47 U.S.L.W. at 4854. See also *Southbridge Plastics Div., W. R. Grace & Co.* v. *Rubber Workers, Local 759*, 565 F.2d 913, 916 (5th Cir. 1978). For present purposes, it is enough to note that other Courts have recognized that bidding preferences

for employees already in a department are indeed seniority rules,[38] and that other inhibitions on transfer between seniority or bargaining units can be integral to the seniority system and protected by Section 703(h).[39]

The most intensive treatment of Section 703(h) in this context was made by the Sixth Circuit Court of Appeals in *Alexander* v. *Aero Lodge 735, Int'l Ass'n of Machinists*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). In that case, the collective bargaining agreement contained a "job equity" feature which accorded a preference in filling vacancies to employees who had previously performed the job in question. Although the agreement had been amended to provide for the use of plant seniority in competitive situations, retention of the "job equity" feature caused the system to operate somewhat like an occupational seniority system. Junior employees with "job equity" could be preferred over employees with more plant seniority. The District Court had found that "job equity" was unlawful because it perpetuated past discrimination. In reversing, the Court of Appeals held:

> "With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. The Act, however, speaks not simply of seniority but of 'a bona fide seniority . . . system.' A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to

[38] *Harris* v. *Anaconda Alum. Co.*, 19 [CCH] EPD ¶ 9230, at 7354-56 (N.D. Ga. 1979); *EEOC* v. *E. I. duPont de Nemours & Co.*, *supra*, 445 F. Supp. at 247-48; *Croker* v. *Boeing Co.*, 437 F. Supp. 1138, 1187 (E.D. Pa. 1977).

[39] *Dickerson* v. *United States Steel Corp.*, 439 F. Supp. 55, 72-73 (E.D. Pa. 1977).

> indicate that it should stand on a different footing than traditional plantwide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.'
>
> "Therefore we are obliged to hold that in light of *Teamsters*, the district court erroneously concluded that the defendants violated Title VII by utilizing a seniority system, including its job equity feature, that perpetuated pre-Act discrimination." [565 F.2d at 1378-79 (footnote omitted).]

There are definite parallels between the "job equity" feature in *Alexander* and the system under consideration here. Each system represents a variation from total length of service as the controlling determinant in competitive situations. Both the "job equity" feature and the forty-five week industry service rule are integral to the seniority systems of which they are a part, since they establish orders of priority among competing employees based upon time worked. They are seniority rules protected by Section 703(h) because, along with other seniority rules in the respective collective bargaining agreements, they control those job expectations and vested rights that Congress adamantly wished to preserve.

Although the status of Section 703(h) in the several Circuits is not entirely clear, no Court has gone as far in diminishing seniority protections as the Court of Appeals for the Ninth Circuit did in the instant case. Not since *Teamsters* was decided has any other Court undertaken such a fundamental restructuring of seniority rights. Yet in manifesting its intention that preferential treatment not be required by Title VII, Congress disabled the Courts from ordering the "abrogation of preexisting seniority rights." *United Steelworkers* v. *Weber*, *supra*, 47 U.S.L.W. at 4857 (Blackmun, J., concurring). At the very least, this consideration weighs heavily

against the dissection of established contractual systems for the purpose of determining whether each component, taken by itself, expresses the requisite fidelity to length of service. The danger of this approach, as illustrated by the instant case, is that invalidation of a particular contract provision not thought to be a seniority rule because it qualifies the acquisition or application of seniority can, in fact, profoundly alter employee seniority expectations.

3. *Classification Devices Contrasted*

The Court below believed that the forty-five week industry service rule for the acquisition of permanent status is simply a "classification device to determine who enters the permanent employee seniority line." 585 F.2d at 427 n.11 (Pet. App. 12). It saw no difference between the forty-five week rule and any hiring or promotional policy that does not "become part of the seniority system merely because it affects who enters the seniority line." *Id.* This reasoning is unpersuasive. The forty-five week rule is based on industry service as defined in the rule itself. It is not an employment test,[40] a physical requirement,[41] a relative ability criterion,[42] an educational standard,[43] or other screening device used by employers to ascertain employee capability for hire or advancement.[44] Certainly there is a significant difference

[40] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. 424.

[41] *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977).

[42] *Movement for Opportunity* v. *Detroit Diesel Div., General Motors Corp.*, 18 [BNA] FEP 557, 569-70 (S.D. Ind. 1978).

[43] *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. 424.

[44] Classification devices of this type are challengeable if they have a discriminatory impact on minority hiring and advancement. Unless the device is justified by a showing of job relatedness, its discriminatory impact is sufficient to make out a Title VII violation. "Impact discrimination" is significantly different than the "past discrimination perpetuated" theory on which the instant case was tried and appealed. Disproportionate impact and job relatedness are critical issues in "impact discrimination" cases, *Dothard* v. *Rawlinson*, *supra*, 433 U.S. 321, while "past discrimination perpetuated" theories turn on a failure to extend a remedy for earlier acts of discrimination. See *Teamsters* v. *United States*, *supra*, 431 U.S. at 348. See also *United Airlines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), cert. denied, 60 L.Ed.2d 239 (1979); *Farris* v. *Board of Educ.*, 576 F.2d 765 (8th Cir. 1978), for discussion of some of the legal consequences of this distinction.

between classification devices, which are used by employers to inform their discretion in employee selection decisions, and a collectively bargained system designed to limit that very discretion.[45] Employees have certain defined expectations under the forty-five week industry service rule; they have no rights under the classification devices to which the Court of Appeals for the Ninth Circuit thought the rule could be analogized.

4. *Conclusion*

The seniority provisions in the Joint Board Brewery Agreement, including the forty-five week industry service rule, are admittedly elaborate (R. 79) and somewhat unique. But the fact that these rules do not operate "normally" (585 F.2d at 427, Pet. App. 11) is no basis for finding that they do not constitute a "seniority system," and, in consequence, abrogating the seniority rights and expectations that incumbent employees have already earned. Had Congress intended to protect only "normal" seniority systems, or simply those providing "for incremental increases in employment rights and benefits based on length of overall service" (*id.*), both Section 703(h) and the legislative history would read differently. The Court of Appeals' fears that the forty-five week rule can be discriminatorily applied are more appropriately ad-

[45] G. Cooper & R. Sobol, *supra* note 19, at 1604; B. Aaron, *supra*, 75 Harv. L. Rev. at 1534-35.

dressed to a future determination of whether the seniority system is "bona fide" than asserted as a supposed reason why the provision is not part of the system. Here the forty-five week rule is an integral part of the unique seniority system negotiated for the protection of brewery employees, and the lower Court's decision to the contrary is erroneous.

II.

THE COURT OF APPEALS IMPROPERLY CONCLUDED THAT THE JOINT BOARD BREWERY AGREEMENT'S FORTY-FIVE WEEK INDUSTRY SERVICE RULE SIGNIFICANTLY AND ABNORMALLY DEPARTS FROM LENGTH OF SERVICE CRITERIA WITHOUT RECORD EVIDENCE OR ANY CONSIDERATION OF THE CONVENTIONAL USES OF SENIORITY IN THE PROCESS OF COLLECTIVE BARGAINING

Part I of this Argument demonstrates that the Joint Board Brewery Agreement's forty-five week industry service requirement for achieving permanent status is a seniority rule. It establishes orders of priority among incumbent brewery employees, as reflected on seniority referral and plant seniority lists, which govern important competitive and beneficial employment rights. Accordingly, the rule is an integral part of the Agreement's seniority system and protected against attack by Section 703(h). In Part II of the Argument, we show the significant correlation between length of industry service and the acquisition of permanent status due to the interplay of the Agreement's various seniority rules. Variations from absolute length of service criteria are common in seniority rules developed through collective bargaining, and do not furnish a basis for withholding Section 703(h)'s protections. Additionally we urge that the Court of Appeals erred in deciding that the forty-five week rule was neither a seniority system nor part of a seniority

system before an appropriate factual record was made in the District Court.

A. Sections 4 and 5 of the Agreement Establish A Combination Seniority System Which Accords Significant, If Not Always Controlling, Weight To Total Length Of Service

There is a fundamental inconsistency in the Court of Appeals' conclusion that the forty-five week industry service rule does not reward accumulated service, when the vice of the system is said to be that minority employees, formerly excluded from the industry, now cannot achieve permanent status because worsened economic conditions have made it "virtually impossible for any temporary employee, Black or White, to work 45 weeks in one calendar year." 585 F.2d at 424 (Pet. App. 3). Implicit in this assertion of "past discrimination perpetuated" is the assumption that nonminority employees having longer industry service—those who entered the industry under alleged discriminatory conditions before or shortly after Title VII was enacted—were able to achieve permanent status. The essence of the alleged violation is that, "but for" the past discrimination, Bryant and similarly situated minority employees would have entered the industry earlier, and, as a result, would also have attained permanent status (R. 307). Cf. *Watkins* v. *United Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975).

The elements of the alleged Title VII violation suggest a correlation between length of service and the acquisition of permanent status. To the extent Bryant alleges, as he must to establish disparate treatment, that nonminority employees who earlier entered the industry achieved permanent status ahead of newer employees,[46]

[46] Cf. R. 304, where Bryant complains of bumping preferences accorded to "old Burgermeister employees."

his theory presupposes that permanent status is a consequence of greater age in the industry. Moreover, unless it is assumed that the attainment of permanent status is essentially a function of continued industry employment, there would be no basis for concluding that Bryant would have completed the necessary forty-five weeks of employment in a calendar year to reach permanent status, even if he had not suffered the discrimination he alleges. The problem Bryant faces, therefore, is that his legal theory requires the existence of a seniority system.

The lower Court's reasoning was also flawed by the assumption that "true" seniority rights must accrue automatically over time. 585 F.2d at 427 (Pet. App. 11). It is apparent that what disturbed the Court of Appeals is the fact that permanent status is not obtained automatically, as a matter of absolute certainty, based on an employee's overall length of employment in the industry. But just as many seniority systems do not accord controlling effect to overall length of service (*Teamsters* v. *United States, supra*, 431 U.S. at 350), seniority systems do not often provide for a fully automatic accrual of rights. Frequently allowances will be made for contingencies or variables—most importantly, layoff due to illness or reductions in force—that serve to interrupt the accrual of seniority and delay realization of the advantages dependent thereon.[47] Cf. *Tilton* v. *Missouri Pac. R.R.*, 376 U.S. 169 (1964).

Under Sections 4 and 5 of the Joint Board Brewery Agreement, assuming a stable labor market, there is a reasonable certainty that permanent status will be acquired by employees as a consequence of their continued employment in the industry. As a temporary employee's industry service and seniority increase, so do his chances

[47] U.S. Dep't of Labor, Bureau of Labor Statistics, *Collective Bargaining Provisions, Seniority* (Bull. 908-11), at 52-53 (1949).

of achieving permanent status and with it more valuable seniority rights. This correlation between length of service and advancement to the permanent tier within job classifications is apparent from the operation of the seniority referral and plant seniority rules in the Agreement.

After advancing to the temporary tier in his classification, a temporary employee will be dispatched in accordance with his seniority ahead of all new employees and temporary employees with less industry and plant service. Upon referral, he will build plant seniority within his classification as a temporary employee in the establishment. His ability to hold, or avoid layoff, at the establishment increases in accordance with his plant seniority, in that new employees and temporary employees with less plant seniority must be laid off before him. If the temporary employee cannot hold at the establishment, he returns to the hiring hall for another dispatch on the basis of his industry service. Due to the Agreement's seniority referral rules, a temporary employee's employment will become more regular as his time in the industry increases. Since the forty-five week rule is satisfied by industry, not simply establishment service, increased regularity in employment will lead to the attainment of permanent status.

The Court below did not comment on these aspects of the Agreement. It chose instead to focus on the possibility that one temporary employee might be referred to an establishment where production is expanding, and complete forty-five weeks of employment in a calendar year at that establishment, while another temporary employee with longer industry service might not be so fortunate. 585 F.2d at 426-27 (Pet. App. 9-11). We may assume *arguendo* that this circumstance can occur, even though the Agreement's referral rules tend to minimize such occurrences by allocating dispatches in seniority order. What is difficult to understand, however, is

why the Court of Appeals regarded this contingency as such a striking departure from "normal" seniority principles.

In an industry consisting of a number of different employers, all producing the same product in competition with each other, labor demand is not necessarily constant. Rising employment at one facility may well be accompanied by falling employment at another. Despite the leavening effect of the Agreement's seniority referral rules, a temporary employee might acquire sufficient plant seniority to hold at one establishment long enough to satisfy the forty-five week rule, while other temporary employees working elsewhere might suffer interruption in the accrual of their seniority rights through layoff. But this says no more than plant seniority rights can be more valuable in one area than another due to prevailing market conditions. Accordingly, the minimal potential for randomness in the operation of the forty-five week rule complained of by the Court below does not represent any gross aberration. Rather it reflects the familiar proposition that the job security and employment rights of all employees are tied to the fortunes of their employer. Cf. *U.A.W., Local 1251* v. *Robertshaw Controls Co.*, 405 F.2d 29 (2d Cir. 1968).

Without any factual record regarding the operation of the Agreement, little more can be said than the structure of the seniority system, including the forty-five week rule, is designed to reward age in the industry, as well as plant service within seniority tiers and job classifications. The limited evidence in the record surely furnishes no basis for declaring that the forty-five week rule represents a wholesale departure from seniority principles. At least, therefore, the Court of Appeals for the Ninth Circuit erred in finally deciding the Section 703(h) issue without a trial. See *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). The unique character of the industry, the reasons underlying adoption of the forty-five week rule in

collective bargaining, the unwritten seniority practices of the parties,[48] and the degree to which competitive and beneficial rights increase according to time worked,[49] are factual issues requiring exploration before any final decision that Section 703(h) is inapplicable can be made. Cf. *Teamsters* v. *United States*, *supra*, 431 U.S. at 375; *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977).

B. Seniority Systems Agreed To In Collective Bargaining Often Provide For Variations From Absolute Length Of Service Criteria In Computing Seniority Rights

When the Ninth Circuit Court of Appeals' decision is examined against a backdrop of "the conventional uses of seniority in the process of collective bargaining," [50] its shortcomings become readily apparent. Seniority provisions reflect various length of service criteria which are rarely absolute. *Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. at 338-39. Like other clauses of the collective bargaining agreement, seniority arrangements must reflect the flexibility necessary to cope with the realities of industrial life. Cf. *Humphrey* v. *Moore*, 375 U.S. 335, 355-58, reh'g denied, 376 U.S. 935 (1964) (Goldberg, J., concurring). No doubt for this reason agreements eschew a dogmatic, pervasive reliance on total length of service. This Court has recognized that:

> "There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All

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[48] See U.S. Dep't of Labor, Bureau of Labor Statistics (Bull. 1425-14), *supra* note 19, at 1.

[49] See note 46, *supra*.

[50] *Aeronautical Indus. Dist. Lodge 737* v. *Campbell*, *supra*, 337 U.S. at 526.

> these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations." [*Aeronautical Indus. Dist. Lodge 727* v. *Campbell, supra*, 337 U.S. at 526-27 (citations omitted).]

Seniority provisions are as diverse as the industrial settings in which they are found. Little purpose would be served by attempting to catalogue here all the ways length of service can be qualified by rules relating to the acquisition, measurement and application of seniority. In general terms, however, most qualifying rules fall into one or more of these categories: definitions of the unit of seniority;[51] provisions relating to the acquisition of seniority, such as probationary requirements, retroactivity features and status upon completion of training;[52] provisions stipulating how seniority can be modified or its accrual interrupted due to leaves of absence, layoff, refusals to accept promotion, and transfers or promotions out of the unit;[53] provisions for loss of seniority

[51] *Teamsters* v. *United States, supra*, 431 U.S. at 355 n.41; U.S. Dep't of Labor, Bureau of Labor Statistics (Bull. 908-11), *supra* note 47, at 13-23; U.S. Dep't of Labor, Bureau of Labor Statistics (Bull. 1425-14), *supra* note 19, at 8-12; U.S. Dep't of Labor, Bureau of Labor Statistics (Bull. 1425-11), *supra* note 20, at 11-15 [hereinafter cited as "BLS Bull."].

[52] BLS Bull. 908-11, at 6-12; BLS Bull. 1425-14, at 5-7.

[53] BLS Bull. 908-11, at 31-45, 55-58; BLS Bull. 1425-11, at 31-34, 45-46, 50-57; BLS Bull. 1425-14, at 21-24.

due to discharge, layoff or voluntary quit;[54] provisions for retention or calculation of seniority in the event of mergers, plant movement or interplant transfers;[55] and exceptions from length of service in determining the seniority rights of union officials and other special employee groups.[56]

Within these broad categories, there are various provisions bearing a marked resemblance to the forty-five week industry service rule. It is not uncommon, for example, to require employees to fulfill a minimum period of actual employment within a specific time frame in order to obtain or improve seniority rights. *Gerber Prods. Co., supra*, 12 N.W.L.B. 74; *General Motors Corp.*, 22 N.W.L.B. 233 (1945); BLS Bull. 908-11, at 7. Cf. *B. F. Goodrich Co.*, 14 N.W.L.B. 306 (1944). Similarly, layoffs by seniority tier within departments have been provided for in collective bargaining agreements outside the brewery industry. See, e.g., *American Tel. & Tel. Co.*, 20 N.W.L.B. 201, 203 (1944). Although it is unusual in non-construction employment for employees to exercise seniority with different employers, the practice is not unknown. BLS Bull. 1425-14, at 3. More importantly, this seniority practice has long been accepted in the brewery industry. *New Jersey Brewers Ass'n, supra*, 18 N.W.L.B. 114.

The system under attack in the instant case has been in effect for approximately twenty-five years, and the parties have uniformly regarded it as a "seniority sys-

[54] BLS Bull. 908-11, at 51-54; BLS Bull. 1425-14, at 25-30.

[55] *Humphrey* v. *Moore, supra*, 375 U.S. 335; BLS Bull. 908-11, at 47-49; U.S. Dep't of Labor, Bureau of Labor Statistics, *Plant Movement, Transfer and Relocation Allowances* (Bull. 1425-10), at 16-18 (1969).

[56] *Ford Motor Co.* v. *Huffman, supra*, 345 U.S. 330; *Aeronautical Indus. Dist. Lodge 727* v. *Campbell, supra*, 337 U.S. 521; BLS Bull. 908-11, at 23-29; BLS Bull. 1425-14, at 9-12.

tem" (A. 27). It bears a close similarity to systems in effect elsewhere in the brewery industry which have been recognized as "seniority systems." *New Jersey Brewers Ass'n, supra,* 18 N.W.L.B. at 115-16. Variations in, and qualifications of, absolute length of service criteria are common. The very provision held not to be a "normal" seniority rule by the Court below has numerous industrial counterparts, so it cannot fairly be viewed as an aberration. Under these circumstances, the decision of the Ninth Circuit Court of Appeals represents an unprecedented intrusion into the private collective bargaining process that Congress could not have countenanced. See *United Steelworkers* v. *Weber, supra,* 47 U.S.L.W. at 4854. For in dealing with seniority issues, Congress always has been most careful to avoid unnecessarily "interfering with and disrupting the usual, carefully adjusted relations among . . . employees . . . ." *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 273 (1958). Title VII represents no exception.

CONCLUSION

The decision of the Court below, holding that the forty-five week industry service rule is not part of the Agreement's seniority system, strikes at the heart of the system under which the choicest jobs and the greatest protections against layoffs are allocated. *Teamsters* v. *United States, supra,* 431 U.S. at 349. For this reason, and others set forth above, the decision of the United

States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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